# The transmission of liability for exposure to asbestos

**Obligations Law Blog**

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The Inner House of the Court of Session has given its judgment in the case of Bavaird v Sir Robert McAlpine and others, and has held that liability for the exposure to asbestos of a council worker, resulting in his subsequent death from mesothelioma, by the now defunct East Kilbride Development Corporation (EKDC) passed to its successor, South Lanarkshire Council (SLC). In so holding they overturned the decision at first instance that liability did not transmit. The result is good news for employees of statutory bodies, like local authorities, who are negligently exposed to asbestos but who do not go on to develop symptoms, as is common, for many years afterwards: the Inner House's decision means that their right to claim damages will be exercisable against any statutory successor of the body which exposed them to the danger.

I argued elsewhere (see 'Liabilities and Obligations: Two Different Concepts?' (2013) Journal of Professional Negligence 186) that the decision at first instance was an unfortunate one. It seemed perverse that someone's right to claim damages for an asbestos-related injury should be dependent upon whether or not their employer was still in existence (in which case recovery would be undoubted), or whether its rights and liabilities had been taken over by a successor (in which case, according to the 1st instance judgment, there would be no transmission of liability). Holding that liabilities do not transmit to successor authorities thwarts the underlying purpose of the very legislation transferring rights and liabilities in such cases, and is therefore heartening to see a purposive approach to interpreting such legislation being approved of in both of the substantive judgments in the Inner House (those of Lady Paton and Lord Drummond Young).

The outcome at first instance was reached on a judicial assessment of the order transferring rights and obligations from EKDC to SLC as not extending to liabilities which had not matured at the time of the transfer into enforceable obligations to pay compensation to injured parties. This meant that those who had been exposed negligently to asbestos (this constituting the injuria element of a delict) but who did not begin to manifest any ill effects of the exposure (the damnum element of a delict) until after the transfer of liabilities to the successor body were unable to claim. The judge at first instance held that no 'liability' (the term used in the relevant legislative provision) to compensate such people had existed when EKDC ceased to exist, nor indeed could there even be said to be a 'contingent liability' in existence at the time, as for a liability or an obligation to be 'contingent' there had first to be some 'obligation' in existence, and a delictual obligation required the presence of both injuria and damnum before it could be said to exist. In the article in the 2013 JPN referred to above, I criticised this approach, both as misunderstanding the point that liabilities can be contingent in a sense other than that described by the judge at first instance, but also because such an interpretative approach thwarted the purpose of the legislative provisions.

On appeal, Lady Paton, in the leading judgment, made two important arguments justifying the decision to overturn the judgment at first instance:

(1) Construing the order as a whole, and adopting a purposive construction, it was clear that the word "liabilities" in article 2 of the transfer order included "contingent liabilities and potential liabilities", such as liabilities which emerged after the date of transfer (such as liabilities to pay damages which arose only on the manifestation of physical symptoms); and
(2) Quite apart from article 2, there was a further provision of the order (article 3) stating that "anything done" before the date of transfer by EKDC "for the purposes of or in connection with the property, rights and liabilities

transferred by article 2″ was, after the date of transfer, to be treated as having been done by SLC.This meant that the exposure of the deceased employee to asbestos by EKDC was to be treated as something done by SLC, so that in effect both the injuria and the damnum in the case were to be treated as caused by EKDC.

The purposive approach adopted in this first argument is to be approved of, as is the result, but two aspects of Lady Paton's approach are worth exploring further:

(a) what is the difference, if any, between 'contingent liabilities' and 'potential liabilities'?; and
(b) was article 3 in fact supportive of the conclusion reached by the court?

These are considered in turn.

**(a) what is the difference, if any, between 'contingent liabilities' and 'potential liabilities'**

The appearance of the idea of a 'potential liability', and the suggestion that is may be something different to a 'contingent liability', was a development in the Inner House. At first instance there was reference only to 'contingent' liabilities. The change in terminology may reflect usage of the phrase 'potential liability' in the recent Supreme Court case of *In Re Nortel Group of Companies* [2013] UKSC 52 (though this case is not mentioned in the judgments of the Inner House), but if that is so it seems odd to suggest that potential and contingent liability might mean something different, as the judgments in Nortel switch between the language of potential and contingent without seeming to suggest any difference in meaning. So do the two terms differ in meaning? The fact that Lady Paton mentions both might suggest so, and this suggestion is made stronger by a further reference by her (at para 36) to the fact that:

"The pursuers' argument had changed and developed since the debate in the Outer House. In the Outer House, the pursuers periled their case on contingent liability, whereas in the Inner House they relied primarily upon the concept of potential liability, failing which contingent liability."

Counsel clearly thought contingent and potential liabilities were different, and the suggestion is that Lady Paton does too. Frustratingly, what the difference might be between the two is not explained. One suspects that, because of the strong judicial view expressed at first instance that, for a contingent liability to exist, there must be a completed obligation (i.e. injuria plus damnum) to begin with, the reclaimer's counsel in the case were wary of using the idea of contingent liability again on appeal. I think the view taken at first instance was a mistake, as I have argued elsewhere, and there is amply authority, both native and foreign, to suggest that obligations/liabilities may indeed be contingent in the sense of not yet having arisen. However, if the tactic was adopted for the reasons suggested, then it would seem that what perhaps was meant by 'potential liability' was something which is not yet a completed obligation, i.e. (in a delictual context) it is just the presence of injuria without damnum, thus a state of affairs which has the 'potential' to become a completed obligation but only on the occurrence of damnun. It seems to me however that there is no need to have drawn this distinction between potential and contingent liability; as I have argued before, a proper understanding of 'contingency' is that it is a term which can be used to mean EITHER an obligation which has been formed, but under which performance will only become due in the event of some uncertain future event (contracts may be contingent in this sense), OR an obligation which has not yet been formed but which might be, i.e. one whose very existence is contingent upon an uncertain future event (contract and delict can both be contingent in this sense). So, I don't think there was any real need to employ the term 'potential liability' in distinction to 'contingent liability', one could simply have said that the mere presence of injuria gave rise to a contingent liability, and such was caught by the relevant article, but in any event this did not prevent the correct result being reached. It would however have been very helpful to have had explained what the judicial understanding of the difference in the two terms was.

**(b) was article 3 in fact supportive of the conclusion reached?**

As to this second part of Lady Paton's justification for overturning the decision at first instance, I'm not entirely convinced that this in fact was relevant to the question at hand. Her Ladyship says (at para 30) that article 3 has the effect that the "negligent exposure to asbestos" of the deceased man, which occurred during the existence of EKDC, was "something done … by, or on behalf of, or in relation to, EKDC for the purposes of its property, rights and liabilities", and hence transferred under article 3. My concern is that this is arguably stretching the semantics of the phrase 'something done' beyond the purpose the phrase needs to serve.

How were EKDC, in exposing an employee to asbestos, "doing something" for the purposes of, or in connection with, their property, rights or liabilities? Lady Paton, in describing the effect of article 3, gives the example of "general maintenance work on housing stock, including roof repairs" as being something done for such purposes, and one can see why this example makes sense: repairing the roofs of a council's housing stock is something done to maintain its property and thus preserve the value of an existing right of ownership in the property. Similarly, an example of something done to preserve a claim in contract might be a notification to a debtor that EKDC considered a contractual debt as still outstanding – such a notification would reset the prescriptive clock, and thus preserve its right to enforce the contractual debt (the same might be said of a right to claim damages in delict from a party which had negligently damaged Council property). Such an act would quite properly be classed as something done "for the purposes of or in connection with" a contractual (delictual) right (claim), given that it preserves the very existence of the claim. Similarly, the act of EKDC in tendering payment under a debt owed by it, or of entering a defence in an action raised against it, would be something done "for the purposes of in connection with" a liability, and would properly fall, under article 3, to be considered as having been done by the successor authority.

But negligently exposing a person to asbestos is not done for "the purposes of" a right or liability, as it is neither done purposely nor, until the exposure occurs, is there any liability; on the contrary, it is something which *creates* the liability in the first place. Exposure to asbestos could only be done for the "purposes of or in connection with" the liability ensuing if (perversely) it was done with the intention that the Council, in exposing the employee to asbestos to create, would be creating such liability (a very unlikely event).

Now, perhaps it might be countered that my argument adopts too strict an interpretation of the phrase "for the purpose of or in connection with", but I find the application of this provision in connection with negligent (i.e. non-purposeful) exposure to be stretching the meaning of the phrase too far, especially given the context of the article in which it appears, an article designed (it seems to me) to ensure that actions taken in relation to *existing* property and 'obligations' (in the widest sense) of the dissolved entity are to be deemed to be actions of the successor.

It is worth adding that this critical observation on the article 3 point does not undermine the decision of the Inner House: the conclusion reached is perfectly able to stand by reference simply to the interpretation adopted of the meaning of 'liabilities' as used in article 2.

**Conclusion**

Neither of the above two observations on aspects of the generally commendable judgment of Lady Paton in any way undermines the welcome good sense which the decision of the Inner House brings. Had the decision gone the other way, there would doubtless have been mounting pressure for a legislative change to ensure that the unjust deprivation of delictual entitlement in cases of this sort was rectified. I understand that the Inner House's decision may be being appealed to the Supreme Court. If so, it is to be hoped that the outcome provided for by the Inner House is preserved.